had not dealt adequately with the matter, would be fatal to the appeal, and indeed it is acknowledged that it would be fatal unless the learned judge came to his decision on a wrong view as to the *onus* of establishing the question of whether the note was or was not a genuine document. The learned judge, however, clearly states that his decision is based upon his acceptance of the evidence of the respondent's witnesses and the Court of Appeal so interpreted his finding. They say: "The learned trial judge stated that the main reason for his decision was the opinion he had formed of comparative reliability of the witnesses. This is an advantage not possessed by this court and in the circumstances I am of the opinion that this court is 'not in a position to come to any satisfactory conclusion' on the written evidence." In other words, the Court of Appeal, like the learned trial judge, were baffled by the mere perusal of the documents in the case, but took the view that the learned judge had considered the evidence of the witnesses and come to his opinion upon an observation of their demeanour and a scrutiny of their evidence.

Their Lordships are in agreement with the Court of Appeal in thinking that that is a true interpretation of the judgment which the learned judge delivered, and on that view, find no ground on which they would be justified in differing from it and will humbly advise Her Majesty to dismiss the appeal. As the respondent has not been represented, there is no question of costs to be dealt with.

Appeal dismissed.

P. C. RM. L. LETCHUMANAN CHETTIAR v. A. L. S. SADAYAPPA CHETTIAR.

[P. C. (Lord Normand, Lord Cohen and Sir John Beaumont) January 12, 1953]

[Privy Council Appeal No. 45 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(b)(i) — Onus — Principles on which new trial ordered.

This was an appeal from the decision of the Court of Appeal, Federation of Malaya, to the Judicial Committee of the Privy Council. The Judgment of the Court of Appeal is reported in (1951) M.L.J. 105.

At the trial the respondent's Advocate opened his case by submitting that the issue was one of "demand for defendant to prove". The appellant's advocate concurred in that proposition and proceeded to call evidence. No witnesses were called on behalf of the respondent. In an oral judgment, Abott, J. who tried the case said: "The evidence called upon the part of the defendant has failed to satisfy me that any demand was in fact made. There must therefore be judgment for the plaintiff with costs." The defendant appealed to the Court of Appeal. The Court of Appeal in allowing the appeal held that in order to succeed the plaintiff must establish his right to relief under the Ordinance. The Court of Appeal considered whether, in the circumstances of this case, a new trial should be ordered and decided that they could see no good reason for ordering a new trial and entered judgment for the respondent. The appellant (plaintiff) appealed to the Privy Council.

In the argument which the appellant's Counsel addressed to their Lordships of the Privy Council there was no challenge of the principle enunciated by Lord Chelmsford in Shedden v. Patrick[1] and referred to by Foster Sutton, C.J. in the judgment of the Court of Appeal and no contention that the appellant has been surprised. What was said was that the trial Judge had decided this case on an erroneous view of the onus which had been accepted by him before any oral evidence was led, and that in consequence of the wrong direction upon onus the appellant had at the trial probably or possibly refrained from calling a witness whom he might have called, and that in this way the appellant had suffered injustice in consequence of the Judge's wrong direction.

The Board in dismissing the appeal held agreeing with the Court of Appeal that the onus of proving no demand rested on the appellant. Held further that the erroneous direction on onus is ground for granting a new trial, if the error has led to substantial injustice but in this case the appellant has failed to show with any probability that injustice or prejudice resulted from the ruling on onus.

Cases referred to:—

(1) *Shedden v. Patrick* (1869) L.R. 1 H.L. Sc. 470 at 545.
(2) *Doe d. Bather v. R. Brayne & anor.* (1848) 5 C.B. 655.
(3) *Brandford v. Freeman* (1850) 5 Exch. 735.
(4) *Edwards v. Mathews* 4 D. & L. 72.
(5) *Sanders v. Sanders* (1881) 19 Ch. D. 373.

PRIVY COUNCIL.

The judgment of their Lordships was delivered by:—

Lord Normand: — This is an appeal from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya reversing a judgment of Abbott J. sitting as judge of first instance in the High Court at Malacca. The questions at issue are concerned with the application of certain provisions of the Debtor and Creditor (Occupation Period) Ordinance No. 42 of 1948 Federation of Malaya, which came into effect on 1st October, 1948, and was designed to regulate the relationship of debtor and creditor as regards debts incurred before and during the enemy occupation of the territory of the Federation. The period of occupation as defined by the Ordinance was from the 15th February, 1942 to the 5th September, 1945 (Section 2(1)).

In this period the Japanese issued a new dollar currency, referred to in the Ordinance as "occupation currency" which circulated freely throughout the Federation side by side with the existing Malayan currency. Occupation currency was used to meet and

discharge liabilities and debts but in the latter part of the occupation period it depreciated severely in terms of Malayan dollars and finally became valueless. It was to remedy injustices suffered by creditors who were repaid in depreciated occupation currency that the Ordinance was made.

The relevant provisions of the Ordinance are: — "Section 4(1) Subject to the provisions of sub-section (2) of this section where any payment was made during the occupation period in Malayan currency or occupation currency by a debtor or by his agent . . . to a creditor or to his agent . . . and such payment was made in respect of a pre-occupation debt such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.

(2) In any case . . . (b) where such payment was made after the 31st December, 1943, in occupation currency in respect of a pre-occupational capital debt exceeding 250 dollars in amount which . . . (ii) if due was not demanded by the creditor or by his agent on his behalf and was not payable within the occupation period under a time essence contract . . . such payment shall be revalued in accordance with the scale set out in the schedule to the Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation." "Pre-occupation capital debt" is defined as meaning any pre-occupational debt other than a sum accruing due after the commencement of the occupation period in respect of rent or interest (section 4(3)) and pre-occupation debt is defined as a debt payable by virtue of an obligation incurred prior to the commencement of the occupation period and accruing due at any time (section 2(1)). There is a provision by which for the purposes of the Ordinance any person who had authority to act as agent for another immediately prior to the commencement of the occupation period was deemed, subject to certain safeguards, to have been the agent of his former principal to the extent that he continued, during the occupation period and while his former principal was absent, to act on behalf of his former principal in any matter which would have been within the scope of his former authority (section 2(2)). There are also provisions enabling the creditor whose debt had been secured by a charge over property to have the property charged with the revalued balance of the debt and interest. (Section 11).

The facts are simple. In October, 1941, the appellant advanced 26,000 dollars to the respondent secured by a mortgage. The debt was a pre-occupation capital debt. On 16th July, 1943, the respondent paid to the appellant the sum of 10,000 dollars, and on 25th September a further sum of 16,000 dollars together with all interest accrued due. These payments were in occupation currency. The mortgaged land was accordingly released from the mortgage and reconveyed by the appellant to the respondent.

The appellant's contention is that the payment of 16,000 dollars made on 25th September, 1944, being a payment in occupation currency made after 31st December, 1943, had not been demanded, though it was due, by him or his agent on his behalf, and should therefore be revalued under section 4(2). By the application of the schedule to the Ordinance the sum of 16,000 dollars would then fall to be revalued at 1,142.86 dollars, with the result that of the capital sum of 26,000 dollars only 11,142.86 dollars would have been repaid, leaving an unpaid balance of 14,857.14 dollars.

The appellant, after giving notice to the respondent to reinstate the mortgage under section 11(3) of the Ordinance, and after the refusal of the respondent to comply, instituted proceedings pursuant to section 11(5) of the Ordinance by an Originating Summons dated 30th December, 1949, claiming a declaration that the lands originally mortgaged were charged with the capital sum of 14,857.14 dollars with interest.

The Summons was supported by an affidavit of 30th December, 1949, by one Karuppiah, who affirmed "I. I am the attorney of the . . . plaintiff." In the second and third paragraph of the affidavit the history of the transaction is narrated. In paragraph 4 it is said, "My Principal the plaintiff nor any other person on his behalf demand payment of the principal sum due under the said mortgage." It will be observed that the affidavit does not state that Karuppiah was the appellant's attorney when or before the repayments were made. An affidavit in answer was made on 7th August, 1950, by Ramalingam Pillay, who deposed that he had been the respondent's attorney during the occupation period and that demands for repayment of the debt had been made verbally by the appellant's *then* attorney down to September, 1944. The implication is that Karuppiah had not been the appellant's attorney in the period down to September, 1944. No application was made to the court in order that either Karuppiah or Ramalingam Pillay's evidence should be tested by cross-examination.

The case came before Abbott J. on 6th October, 1950. It appears from the formal order made by the court that the affidavit of Karuppiah was read in court but that the affidavit of Ramalingam Pillay was not read, and there is nothing in the record to show that Abbott J. regarded either affidavit as of any importance. At the outset of the hearing the appellant's advocate submitted that the issue was one of "demand" (i.e.,

whether repayment had been demanded by the appellant before it was made) and that it was for the respondent to prove it. The respondent's advocate agreed, and the court accepted the view that the *onus* was on the respondent to show that a demand had been made. The respondent then adduced a witness named Murugappan. He deposed that he was the respondent's attorney and that he knew the appellant's attorney who was then in court. He said that in the occupation period he was in Malacca but that Ramalingam was then respondent's attorney. He also said that the appellant's attorney was not then Karuppiah. As to the demand for repayment he said that in the occupation period Ramalingam and he lived in the same house and shared a room, and that the appellant's attorney came several times to their house and demanded payment in his hearing. He was cross-examined to credibility and in answer to one question he said that all the other people who were present when the demands were made were now in India. The appellant's advocate at the end of Murugappan's evidence said that he would call no evidence.

The judgment of Abbott J. is very brief. He said, "The evidence called upon the part of the defendant has failed to satisfy me that any demand was in fact made. There must, therefore, be judgment for the plaintiff with costs."

The respondent appealed and in the Court of Appeal the judgment was given by Foster Sutton C.J. with whom Taylor J. and Wilson J. concurred. The question mainly argued was that of *onus* and the learned Chief Justice held that the *onus* of proving no demand rested on the appellant. Their Lordships have not the smallest doubt that this is the correct view for it was the appellant who relied on the terms of the Ordinance and it was therefore for him to bring himself within them. The judgment of the Chief Justice on this point is not seriously challenged. It is not necessary to say more on this aspect of the case, but it does appear from the judgment that in at least one case decided by the Court of Appeal after the date of the judgment of Abbott J. in this case, the same question had arisen and it is not unlikely that, as the appellant's counsel suggested, the practice in the Courts of first instance had been proceeding on an erroneous view on the question of *onus*.

The learned Chief Justice then dealt with an argument that Karuppiah's affidavit was inadmissible under Order XXXVI rule 3 of the Rules of the Supreme Court, Straits Settlement, because it contained statements which the deponent was not able by his own knowledge to prove. On this the Chief Justice held that since the affidavit had not been objected to at the trial the complaint came too late; but he held that the affidavit had little evidentiary value in discharging the *onus* of proof. Their Lordships find it unnecessary to consider this matter further, for it was not argued to their Lordships that if the *onus* was on the appellant it had been discharged, or that the Court of Appeal should have given judgment for the appellant.

The true issue in the appeal is the last point dealt with by the Chief Justice, whether in the circumstances a new trial should be ordered. He held that the proper course was not to order a new trial but to enter judgment for the respondent. The reason given by him is that the appellant knew what the issue was from the affidavit of Karuppiah and that there was no suggestion that he had been surprised. He cited a well-known passage from the speech of Lord Chelmsford in *Shedden v. Patrick*[1] :—

> "It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

In the argument which the appellant's counsel addressed to their Lordships there was no challenge of the principle enunciated by Lord Chelmsford and no contention that the appellant had been surprised. What was said was that the Trial Judge had decided the case on an erroneous view of the *onus* which had been accepted by him before any oral evidence was led, and that in consequence of the wrong direction upon *onus* the appellant had at the trial probably or possibly refrained from calling a witness whom he might have called, and that in this way the appellant had suffered injustice in consequence of the Judge's wrong direction.

An erroneous direction on *onus* is ground for granting a new trial, if the error has led to substantial injustice. That is the result of two decisions in the middle of last century cited by the appellant's counsel (*Doe d. Bather v. R. Brayne and another*[2], *Brandford v. Freeman*[3]), in which the effect of an erroneous ruling as to the right to begin was the point under consideration. The rule established by these and other cases is repeated in Order 39, rule 6, of the Rules of the Supreme Court in England. There was some doubt whether it formed part of the law of Malaya. Their Lordships were not referred to any Malayan Ordinance or order or printed rule excluding it and they will assume in favour of the appellant that it prevails in the Courts of Malaya (Ordinance No. 43 of 1948, section 36(2)). But it is necessary that the appellant should show that the condition on which the right to a new trial depends has been fulfilled. That

condition is clearly stated by Pollock C.B. and by Parke B. in *Brandford v. Freeman*[3]. Pollock C.B. in that case cited from his own judgment in *Edwards v. Mathews*[4] a passage in which he said "that the plaintiff or defendant having been called on to begin, when proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected." Parke B. said. "This Court has settled, that when there has been a mere error with respect to the order of beginning, as deduced from the pleadings, no new trial ought to be granted, but that it is otherwise if the error has led to substantial injustice." In *Sanders v. Sanders*[5], Jessel M.R., dealing with an application to bring forward fresh evidence before the Court of Appeal said :—

"The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury."

These considerations apply with at least equal force when the application is for a new trial. Their Lordships must therefore consider whether the appellant has succeeded in making out a case of manifest injustice. He can do this by satisfying the Board that there is a strong probability that he has been prejudiced by the error of the Trial Judge in throwing the *onus* on his opponent. In considering this question their Lordships are not disposed to attach importance to the fact that at the trial the appellant's advocate himself appears to have taken the initiative in inducing the error or to the fact that the respondent's advocate agreed that the *onus* lay on him and then changed his attitude in the Court of Appeal. The question where the *onus* lies is a question of law and an admission of law may be subsequently withdrawn. There is also some reason for thinking that the two advocates were only stating to the Trial Judge what at the time was held by the Courts of first instance to be the correct rule.

What is said is that at the moment when the respondent's only witness left the witness box, the appellant's counsel had to make up his mind whether he would adduce any evidence either to establish his own case or to rebut the respondent's case. He had in the appellant's attorney Karuppiah a witness present and available whom he might have called and who might have said that he was attorney for the appellant in the occupation period. Such evidence, if believed, would have given value to his own affidavit and would also have discredited the evidence for the respondent. It must, it was urged, be assumed that Karuppiah could have given this evidence for to suppose otherwise would be to assume that his affidavit was put forward dishonestly and for the purpose of deceiving the Court, and that was not a permissible assumption.

Ingenious as the argument is, their Lordships are unable to give their assent to it. It is all speculation and, if there were substance in it, it ought to have been developed in the Court of Appeal. It is going too far when it is said that an advocate did not adduce evidence which would have been so important to his case merely because he had in his favour a ruling on *onus* and because he had formed a low opinion of his adversary's evidence and believed that the Judge would reject it. It is at least as probable that the appellant's advocate did not call Karuppiah because he feared that his evidence would not help or might even harm his case. But this is also a speculation. Their Lordships do not choose between the various possible explanations of the course taken by the advocate and they certainly make no reflection whatever on his conduct of the case. Their opinion is that the appellant has failed to show with any probability that injustice or prejudice resulted from the ruling on *onus*.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

TAY HEAN SENG v. CHINA INSURANCE CO., LTD.

[C. A. (Mathew, C.J. (F.M.), Brown and Knight, JJ.) January 27, 1953]

[Singapore — Civil Appeal No. 28 of 1952]

Insurance — Motor cycle insurance — Effect of additional typewritten words added at end of Policy contradicting printed words — Question of whether added words were contradictory — Whether plaintiff entitled to rectification.

The appellant had bought a motor cycle from a shop and had asked the dealer to arrange insurance for him. He asked for a policy covering himself only driving, pillion riding, comprehensive. The dealer telephoned to the clerk in charge of the respondent Company and asked for cover for the motor cycle in those terms. The respondent Company agreed to provide that cover and issued a cover note which was delivered to the motor cycle dealer who obtained registration of the motor cycle, and was then provided with a certificate of insurance by the respondent Company. The certificate of insurance was in the usual form and the appellant thereupon paid the premium, took away the motor cycle and did not receive the policy of insurance until some three weeks later.

When the policy was delivered to the appellant it contained a clause under section II dealing with Third Party liability which excluded liability to any person being carried in or upon the motor cycle. However, at the end of the policy under the printed words "premium" were added:—

"$56.25 (additional premium for pillion riding)."

An accident occurred in which a pillion passenger while being carried by the appellant was killed. Judgment and costs to the extent of $12,994.40 was awarded against the appellant who now seeks to recover this sum